FILED
MAR - 6 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574
(Consolidated)

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEP'T OF HEALTH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF NEITHER PARTY SUGGESTING THE ABSENCE OF JURISDICTION

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljosepl@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

These consolidated cases together present the following questions:

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents ii
Table of Authorities iv
Interest of *Amicus Curiae* 1
Statement of the Case 2
Summary of Argument 5
Argument 7
I. The Domestic-Relations Exception to Federal Jurisdiction Denies the Lower Federal Courts Jurisdiction over these Claims 7
A. Marriage-Rights Cases Are Not Suits in Law or Equity 7
1. This Court Need Not Resolve Whether Marriage-Rights Cases Fall within Article III 13
2. These Cases Fall Outside the Lower Federal Courts' Statutory Subject-Matter Jurisdiction 17
3. The Lower Federal Courts' Authority over Marriage Rights May Be Narrower than this Court's Authority under Article III 21
B. Marriage-Rights Litigation Belongs in State Court 24
1. The Constitution Must Be Construed to Have the States – Not this Court or Congress – Set the Policies for Domestic Relations 24

2. A Marriage-Rights Rulings' Profound Effects on Children Counsel for State-Court Review 25
3. The States' Leeway to Craft an Appropriate Remedy Counsels for State-Court Review 28
II. Federal Courts Lack Jurisdiction for Marriage-Recognition Claims 29
A. The Full Faith and Credit Clause – Not the Fourteenth Amendment – Controls Marriage-Recognition Claims 30
B. Plaintiffs Have Not Challenged 28 U.S.C. §1738C, which *Windsor* Did Not Impair 31
C. Federal Courts Lack Jurisdiction for Full-Faith-and-Credit Claims Based on Out-of-State Marriages 32
Conclusion 34

TABLE OF AUTHORITIES

Pages

Cases

Adar v. Smith,
639 F.3d 146 (5th Cir. 2011) (*en banc*) 33

Adoptive Couple v. Baby Girl,
133 S.Ct. 2552 (2013) 23

Albright v. Oliver,
510 U.S. 266 (1994) 30

Am. Well Works v. Layne,
241 US 257 (1916) 22

Ankenbrandt v. Richards,
504 U.S. 689 (1992) 12, 15, 18-19

Baker v. Gen. Motors Corp.,
522 U.S. 222 (1998) 31

Baker v. Nelson,
409 U.S. 810 (1972) 21

Barber v. Barber,
62 U.S. (21 How.) 582 (1859) 9, 12-13, 15, 18

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 16

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 32

Boumediene v. Bush,
553 U.S. 723 (2008) 10

Buckley v. Valeo,
424 U.S. 1 (1976) 32

Califano v. Sanders,
430 U.S. 99 (1977) 19-20

Cent. Va. Cmty. College v. Katz,
546 U.S. 356 (2006) 10
Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116 (1985) 18
Chicago & A.R. Co. v. Wiggins Ferry Co.,
108 U.S. 18 (1883) 33
Crump v. Morgan,
38 N.C. 91 (N.C. 1843) 13
Drake v. Rogers,
13 Ohio 21 (Ohio 1861) 7-8
Dunn v. Palermo,
522 S.W.2d 679 (Tenn. 1975) 8
Ex parte Young,
209 U.S. 123 (1908) 17
Fed'l Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) 11
Fernandez v. Wiener,
326 U.S. 340 (1945) 32
Fourco Glass Co. v. Transmirra Products Corp.,
353 U.S. 222 (1957) 18
Gaines v. Chew,
43 U.S. (2 How.) 619 (1844) 13, 15
Goodridge v. Dep't of Pub. Health,
440 Mass. 309798 N.E.2d 941 (Mass. 2003) 8
Griffin v. Griffin,
327 U.S. 220 (1946) 31
Haddock v. Haddock,
201 U.S. 562 (1906) 31
Haywood v. Drown,
556 U.S. 729 (2009) 10, 19

Heckler v. Mathews,
465 U.S. 728 (1984) 28-29
Hinshaw v. Hinshaw,
237 S.W.3d 170 (Ky. 2007) 28
Hoskins v. Maricle,
150 S.W.3d 1 (Ky. 2004) 7-8
In re Burrus,
136 U.S. 586 (1890) 9, 11, 13, 15
In re M.C.,
195 Cal.App.4th 197 (Cal. Ct. App. 2011) 25-27
In re Receivership of 11910 S Francis Rd,
492 Mich. 208, 821 N.W.2d 503 (Mich. 2012) ... 7-8
In re T.K.Y.,
205 S.W.3d 343 (Tenn. 2006) 28
Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 3
Lee v. Thornton,
420 U.S. 139 (1975) 32
Loving v. Commonwealth,
206 Va. 924, 147 S.E.2d 78 (Va. 1966) 22
Loving v. Virginia,
388 U.S. 1 (1967) 22
M'Elmoyle v. Cohen,
38 U.S. (13 Pet.) 312 (1839) 30-31
Markham v. Allen,
326 U.S. 490 (1946) 16
Marshall v. Marshall,
547 U.S. 293 (2006) 12, 15-16
Martin v. Lessee of Waddell,
41 U.S. 367 (1842) 11

Maynard v. Hill,
125 U.S. 190 (1888) 9
Merrell Dow Pharm., Inc. v. Thompson,
478 U.S. 804 (1986) 12, 19, 22
Michael H. v. Gerald D.,
491 U.S. 110 (1989) 23
Minnesota v. Northern Securities Co.,
194 U.S. 48 (1904) 33
Mostyn v. Fabrigas,
98 Eng. Rep. 1021 (K.B. 1774) 10
Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 4
Murdock v. Memphis,
87 U.S. (20 Wall.) 590 (1875) 20
Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) 18
New York Trust Co. v. Eisner,
256 U.S. 345 (1921) 16
Ohio ex rel. Popovici v. Agler,
280 U.S. 379 (1930) 13
Osborn v. Bank of the U.S.,
22 U.S. (9 Wheat.) 738 (1824) 22
Palmore v. Sidoti,
466 U.S. 429 (1984) 22-23
Parham v. J.R.,
442 U.S. 584 (1979) 27
Pennoyer v. Neff,
95 U.S. (5 Otto) 714 (1878) 24
People v. Duffield,
387 Mich. 300, 197 N.W.2d 25 (Mich. 1972) 8

People v. Stevenson,
416 Mich. 383, 331 N.W.2d 143 (Mich. 1982) 7
Perez v. Ledesma,
401 U.S. 82 (1971) 17
Redhail v. Zablocki,
418 F. Supp. 1061 (E.D. Wis. 1976) 23
Renne v. Geary,
501 U.S. 312 (1991) 4
Reynolds v. U.S.,
98 U.S. 145 (1878) 9
South Carolina v. Regan,
465 U.S. 367 (1984) 20
State ex rel. Cates v. W. Tenn. Land Co.,
127 Tenn. 575, 158 S.W. 746 (Tenn. 1913) 7
State v. Evans,
1 Tenn. 211 (Tenn. 1806) 8
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 3, 5, 23
Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 4
Tafflin v. Levitt,
493 U.S. 455 (1990) 11, 21
Thompson v. Thompson,
484 U.S. 174 (1988) 33
Troxel v. Granville,
530 U.S. 57 (2000) 23
U.S. v. Lopez,
514 U.S. 549 (1995) 10, 18
U.S. v. Ruiz,
536 U.S. 622 (2002) 4

U.S. v. Windsor,
133 S.Ct. 2675 (2013) 22, 25, 30-32
Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 23
W. & S. Life Ins. Co. v. State Bd. of Equalization,
451 U.S. 648 (1981) 31
Washington v. Glucksberg,
521 U.S. 702 (1997) 24
Williamson v. Berry,
49 U.S. (8 How.) 495 (1850) 13, 15
Wyeth v. Levine,
555 U.S. 555 (2009) 10
Zablocki v. Redhail,
429 U.S. 1089 (1977) 23
Zablocki v. Redhail,
434 U.S. 374 (1978) 23

Statutes

U.S. CONST. art. III 4-7, 12-18, 20-24
U.S. CONST. art. III, §2 14
U.S. CONST. art. IV, §1 31-32
U.S. CONST. amend. X 11, 21
U.S. CONST. amend. XIV 6, 13, 22, 24, 26-27, 30
KY. CONST. §233A 2-3
MICH. CONST. art. 1, §25 2
OHIO CONST. art. XV, §11 2
TENN. CONST. art. 11, §18 2
1 U.S.C. §7 32
28 U.S.C. §1254(1) 5
28 U.S.C. §1257 22

28 U.S.C. §1331 ..... 5, 17-20, 22, 33
28 U.S.C. §1343 ..... 17-18, 20
28 U.S.C. §1343(a)(3) 5, 17
28 U.S.C. §1346(a)(1) 22
28 U.S.C. §1738C 6, 31-32
42 U.S.C. §1983 17
KY. REV. STAT. §402.005 3
KY. REV. STAT. §402.040(2) 3
KY. REV. STAT. §402.020(1)(d) 3
KY. REV. STAT. §402.045(1) 3
MICH. COMP. LAWS §§551.1-551.4 2
MICH. COMP. LAWS §§551.271-551.272 2
MICH. COMP. LAWS §§722.1101-722.1013 28
OHIO REV. CODE ANN. §3101.01(C) 2
TENN. CODE ANN. §36-2-304(a) 25
TENN. CODE ANN. §36-3-113 2
Judiciary Act of 1789,
1 Stat. 73 15
Civil Rights Act of 1871,
17 Stat. 13 17
Judiciary Act of 1875,
18 Stat. 470 17
36 Stat. 1087 (1911) 15, 17-18
Pub. L. No. 96-486, §2(a),
94 Stat. 2369 (1980) 20
2013 CAL. STAT. 564, §(1)(a) 26
2013 CAL. STAT. 564, §(1)(b) 26
Michigan Revocation of Parentage Act,
2012 Mich. Pub. Act 159 28

Rules, Regulations and Orders

S. Ct. Rule 37.6 1

Other Authorities

1 WILLIAM BLACKSTONE, COMMENTARIES *67 ..... 9, 15

1 WILLIAM BLACKSTONE, COMMENTARIES *79 ..... 9, 15

1 WILLIAM BLACKSTONE, COMMENTARIES *83 9

1 WILLIAM BLACKSTONE, COMMENTARIES *84 9

1 WILLIAM BLACKSTONE, COMMENTARIES *433 8

3 WILLIAM BLACKSTONE, COMMENTARIES *37-*46 9

THE FEDERALIST PAPERS, No. 37 (C. Rossiter ed. 1961) 14-15

Nancy D. Polikoff, *And Baby Makes ... How Many? Using* In re M.C. *To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple,* 100 GEO. L.J. 2015 (2012) 25-25

Nos. 14-556, 14-562, 14-571, 14-574
(Consolidated)

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEP'T OF HEALTH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of

[1] *Amicus* files this brief with the consent of all parties; the respondents all lodged blanket letters of consent with the Clerk, and *amicus* has lodged the petitioners' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

husband and wife. In furtherance of that interest, Eagle Forum has participated as *amicus curiae* in various appellate proceedings on same-sex marriage in both state and federal courts. In addition, Eagle Forum has a longstanding interest in applying the Constitution as written and in its federalist structure, including confining federal courts to the spheres that the Founders intended. On balance, while it supports the conclusion that the Sixth Circuit reached in its decision here, *amicus* Eagle Forum cannot support the assertion of federal jurisdiction over state marriage laws and, therefore, files this brief in support of neither party, arguing that the federal courts lack jurisdiction under the "domestic-relations exception" to federal jurisdiction. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In these consolidated actions, plaintiff same-sex couples or the surviving partners of same-sex couples from Ohio, Tennessee, Kentucky, Ohio, and Michigan sue the relevant governmental officers (collectively, "Ohio," "Tennessee," "Kentucky," and "Michigan" and together, the "States") to compel the States either to perform in-state same-sex marriages or to recognize out-of-state same-sex marriages. In each case, State statutes and constitutions define marriage as the union of only a man and a woman. TENN. CONST. art. 11, §18; TENN. CODE ANN. §36-3-113; OHIO CONST. art. XV, §11; OHIO REV. CODE ANN. §3101.01(C); MICH. CONST. art. 1, §25; MICH. COMP. LAWS §§551.1, 551.2, 551.3, 551.4, 551.271, 551.272; KY. CONST.

§233A; KY. REV. STAT. §§402.005, 402.040(2), 402.020(1)(d), 402.045(1). The Michigan plaintiffs argue for in-state marriage rights ("marriage-rights claims"), and the Tennessee and Ohio plaintiffs seek recognition of out-of-state marriages ("marriage-recognition claims"). The Kentucky plaintiffs make both types of claims.

It is axiomatic that "[f]ederal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). For that reason, jurisdiction is a threshold issue that appellate courts must analyze and resolve, even if the parties are prepared to concede the issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). Moreover, that appellate analysis includes not only the jurisdiction of the appellate court itself but also the jurisdiction of the lower courts:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Id. (alterations, interior quotations, and citations omitted). Of course, "a federal court always has jurisdiction to determine its own jurisdiction" *U.S. v. Ruiz*, 536 U.S. 622, 628 (2002), so nothing *prevents* this Court from reaching the jurisdictional issue. To the contrary, appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991).

As this Court has stated often in analogous Article III contexts, these questions go to the proper role of courts in our democracy:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation "is founded in concern about the proper – and properly limited – role of the courts in a democratic society."

Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction").

Significantly, the jurisdictional issues raised by these cases concern both statutory and constitutional

subject-matter jurisdiction. While it is unclear – and unnecessary to decide – whether these types of marriage claims fall within the federal courts' Article III power, *amicus* Eagle Forum respectfully submits that these claims fall within the "domestic-relations exception" to federal jurisdiction, which applies equally to the two potentially relevant statutory grants of federal jurisdiction, 28 U.S.C. §§1331, 1343(a)(3). In their briefs, the Tennessee plaintiffs cite both of these provisions as providing the district court jurisdiction, Tennessee Pet. Br. at 1, and all plaintiffs cite 28 U.S.C. §1254(1) as providing this Court's appellate jurisdiction. *Id.;* Kentucky Pet. Br. at 1; Michigan Pet. Br. at 1, Ohio Pet. Br. at 1. The other plaintiffs do not identify a basis for district-court jurisdiction. Given its obligation to assure itself of the underlying courts' jurisdiction, *Steel Co., supra,* this Court must resolve the questions of the lower courts' power to hear these cases.

SUMMARY OF ARGUMENT

In pertinent part, both the Constitution and the statutes defining the lower federal courts' subject-matter jurisdiction confine the federal courts to cases at law and equity. While that may sound broad, it is not complete. Under the court structure in England at the time that the Framers drafted Article III and Congress defined the lower federal courts' subject-matter jurisdiction, the question of what constituted a legal marriage was neither a case at law nor a case in equity. Since those law-and-equity limits continue to apply directly under the Constitution and indirectly under the grants of jurisdiction to the lower federal courts, the "domestic-relations

exception" to federal jurisdiction – which this Court long ago recognized – denies jurisdiction to the lower federal courts here. Because these cases do not arise from state supreme courts, this Court need not now decide whether its Article III jurisdiction extends to pure marriage-rights cases that are not suits at law or equity.

Jurisdiction aside, given that rewriting the States' definition of marriage would have profound impacts on domestic relations in the affected States, these cases belong in the state courts that have expertise in the relevant areas of family law. Likewise, the States' option to remedy any constitutional violation by exiting the marriage field – as opposed to opening the State's marriage laws – further argues for having state courts hear marriage-rights cases.

The Fourteenth Amendment claims for marriage recognition are, in essence, claims under the Full Faith and Credit Clause; when the Constitution provides a direct basis for relief, plaintiffs cannot repackage their full-faith-and-credit "rights" into another constitutional claim. Moreover, Congress exercised its plenary authority under the Full Faith and Credit Clause to enact 28 U.S.C. §1738C, which authorizes the States' actions here. Properly viewed as full-faith-and-credit claims, marriage-recognition claims fall outside the federal courts' jurisdiction because the Clause merely provides a procedural rule for seeking recognition in state court and does not create a right enforceable in federal court.

ARGUMENT

I. THE DOMESTIC-RELATIONS EXCEPTION TO FEDERAL JURISDICTION DENIES THE LOWER FEDERAL COURTS JURISDICTION OVER THESE CLAIMS

The domestic-relations exception to federal jurisdiction recognizes that domestic-relations cases fall outside the categories of cases at law and equity over which both Article III and statutory subject-matter jurisdiction extend the federal judicial power. The exclusion of domestic-relations cases fits both within the legal meaning of the terms used in Article III and the original statutes and within the federalist structure and policies of our Constitution.

A. Marriage-Rights Cases Are Not Suits in Law or Equity

Not only when the founders drafted Article III and the original states ratified it, but also when Congress drafted the precursors to the federal courts' statutory federal-question and civil-rights jurisdiction, a case asserting the right to marriage was not a case at law or equity. Accordingly, marriage-rights cases fall outside the federal judicial power.

In the States, the common law prevails except as abrogated by their constitutions, legislatures, or state courts. *People v. Stevenson*, 416 Mich. 383, 389, 331 N.W.2d 143 (Mich. 1982); *Hoskins v. Maricle*, 150 S.W.3d 1, 30 & n.28 (Ky. 2004); *Drake v. Rogers*, 13 Ohio 21, 28-29 (Ohio 1861); *State ex rel. Cates v. W. Tenn. Land Co.*, 127 Tenn. 575, 640, 158 S.W. 746 (Tenn. 1913). Like most (if not all) other American jurisdictions, common law in the States was adopted from the English common law, *In re Receivership of*

11910 S Francis Rd, 492 Mich. 208, 219, 821 N.W.2d 503 (Mich. 2012); *Hoskins,* 150 S.W.3d at 30 & n.28; *Drake,* 13 Ohio at 28-29; *Dunn v. Palermo,* 522 S.W.2d 679, 682 (Tenn. 1975), and the States therefore naturally look to English cases as authoritative on common-law issues. *People v. Duffield,* 387 Mich. 300, 314, 197 N.W.2d 25 (Mich. 1972); *State v. Evans,* 1 Tenn. 211, 213 (Tenn. 1806); *Hoskins,* 150 S.W.3d at 30 & n.28; *Drake,* 13 Ohio at 28-29.

In English common law, marriage was defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 343, 798 N.E.2d 941 (Mass. 2003) (*quoting Hyde v. Hyde,* [1861-1873] All E.R. 175 (1866)). At the time of this Nation's founding, England's Ecclesiastical Courts had sole jurisdiction over marriage:

> The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the [ecclesiastical or] spiritual courts.

1 WILLIAM BLACKSTONE, COMMENTARIES *433 (emphasis in original). Thus, this Court's analysis of these cases must consider not only the founding-era's English definition of marriage but also the division of English judicial authority in marriage-related cases.

Blackstone recognized three types of unwritten or common law: general customs, particular customs that affect particular districts, and particular customs adopted and used by particular courts (*e.g.*, civil and canon laws). *Id.* *67, *79. The courts responsible for the third common-law group included the Ecclesiastical Courts, as well as the university, military, and admiralty courts. *Id.* *83. An appeal from these courts lay in the Crown, not to the appellate courts at Westminster. *Id.* *84. At the time, cases at law were heard before the Court of King's Bench or the Court of Common Pleas, and cases in equity were heard before the Court of Exchequer or the Court of Chancery. 3 BLACKSTONE *37-*46. In 1787, only Ecclesiastical Courts could hear marriage-related cases like these cases: "upon the separation of the ecclesiastical courts from the civil[,] the ecclesiastical [was] supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage." *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878); *accord Barber v. Barber*, 62 U.S. (21 How.) 582, 591 (1859);[2] *In re Burrus*, 136 U.S. 586, 593 (1890); *cf. Maynard v. Hill*, 125 U.S. 190, 206 (1888).

In addition to separating power between the executive, legislative, and judicial branches, our

---

[2] Significantly, the *Barber* majority did not disagree on this point with the *Barber* dissent, which was even more clear: "it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised." *Id.* at 604 (Daniel, J., dissenting).

Constitution also divides power between the federal government and the states:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). In England, by contrast, the sovereign powers – both the inter-branch powers and the local-national powers – were combined in the Crown and only in the Crown. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 366 (2006); *Boumediene v. Bush*, 553 U.S. 723, 748 (2008). Whereas all claims under English law must lie within *some* English court, *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), it is not true here that all claims must lie within some *federal* court. While many claims fall within the concurrent jurisdiction of federal and state courts, *Haywood v. Drown*, 556 U.S. 729, 735 (2009), some claims fall exclusively with one sovereign's courts. As explained in this section, both this Court (previously) and the states easily have recognized that domestic relations fall within the states' retained powers and not within the federal sphere.

Our Constitution establishes a federal structure of dual state-federal sovereignty, *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990), which the states entered with their retained "sovereignty intact." *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002); U.S. CONST. amend. X. The question presented here is whether the People or the States surrendered their power over domestic relations to the federal government:

> When the Revolution took place, the people of each state became themselves sovereign; and in that character held [all of the powers previously held by the Crown] subject only to the rights since surrendered by the constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. 367, 406 (1842). More specifically, the question presented here is whether the states – as heirs to the Crown's full sovereign, judicial powers – surrendered the sliver of judicial power over domestic relations, which the Ecclesiastical Courts exercised in England.

Consistent with our federal structure, in which the states remain sovereign in spheres not delegated to the federal government, this Court long ago recognized a domestic-relations exception to federal jurisdiction:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

Burrus, 136 U.S. at 593. Indeed, this Court had previously "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of

divorce, ... either as an original proceeding in chancery or as an incident to divorce *a vinculo*." *Barber*, 62 U.S. (21 How.) at 597. That exception has both a *statutory* and a *constitutional* component, and it concerns both where litigation starts and where it ends.[3]

The statutory and constitutional questions pose the same etymological issue, but the statutory one focuses not on the outer limits of the federal judicial power but on the limits that Congress intended when it created the lower federal courts. Of course, the two are not the same thing. The "Article III ... power to hear cases 'arising under' federal statutes... is not self-executing," and Congress need not provide the lower federal courts with the full scope of judicial power that Article III makes available to this Court. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986). The *statutory* issue is whether Congress included this type of domestic-relations issue when it created the federal courts and established their jurisdiction over federal-question and civil-rights cases in law and equity. The *constitutional* question is whether Article III's grant of jurisdiction over cases in law and equity encompasses issues of domestic relations. As explained below, these cases may present only the statutory question of where litigation starts – *e.g.*, state or federal court – without addressing whether this Court has power to

---

[3] In *dicta*, this Court recently sought to narrow the bounds of the domestic-relations exception to federal jurisdiction. *See Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (diversity jurisdiction) (discussed *infra*); *cf. Marshall v. Marshall*, 547 U.S. 293, 306-09 (2006) (probate and bankruptcy).

hear such cases under the federal Constitution when a case arises from state courts.

Before the Fourteenth Amendment's ratification, this Court and the states recognized the distinct jurisdictions of a "court of admiralty, chancery, ecclesiastical court, or court of common law." *Williamson v. Berry*, 49 U.S. (8 How.) 495, 540-541 (1850); *Gaines v. Chew*, 43 U.S. (2 How.) 619, 645 (1844) ("equity will not set aside a will for fraud [because] where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and at law, on a devise of real property"); *Crump v. Morgan*, 38 N.C. 91, 98-99 (N.C. 1843) (recognizing "the canon and civil laws" of English "Ecclesiastical Courts ... and as parts of the common law, which by custom are adopted and used in peculiar jurisdictions"); *see also Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (allowing state-court divorce suit against foreign consul, notwithstanding exclusive federal jurisdiction such suits generally, based on the domestic-relations exception under *Burrus* and *Barber*). As explained in Section I.A.1, *infra*, this Court's more recent efforts to narrow the domestic-relations exception – and thus to aggrandize federal power – fail to address the arguments and history that justified the exception in the first place.

1. This Court Need Not Resolve Whether Marriage-Rights Cases Fall within Article III

Constitutionally, there is a question as to the scope of the judicial power conveyed to federal courts (including this Court) by Article III, §2:

> The judicial power shall extend to all cases, *in law and equity*, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, §2 (emphasis added). The uncertainty lies in the term of art "cases in law and equity," which did not include pure marriage-rights issues when the states ratified the Constitution.

In writing about "delineating the boundary between the federal and State jurisdictions," Madison indicates that the Framers were well aware of the various jurisdictions in English law:

> The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general

> and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed.

THE FEDERALIST PAPERS, No. 37, at 224-25 (C. Rossiter ed. 1961). Indeed, more contemporaneously with the applicable legal doctrines, this Court had no difficulty in recognizing that domestic-relations cases are not cases in law or equity. *Williamson*, 49 U.S. (8 How.) at 540-541; *Gaines*, 43 U.S. (2 How.) at 645; *Burrus*, 136 U.S. at 593; *Barber*, 62 U.S. (21 How.) at 584. Significantly, *Ankenbrandt* and *Marshall* do not hold to the contrary.[4]

Like *Barber*, *Ankenbrandt* concerned a tort suit, which would constitute a suit at law or equity, 504 U.S. at 704; as such, the Court's declining to research English legal history to understand the terms of Article III was appropriate because the case did not turn on the distinctions between law courts, chancery courts, and ecclesiastical courts. Any statements on the contours of the domestic-relations exception in *Ankenbrandt* are *dicta* for the same reason that they were *dicta* in *Barber:* a tort suit, as

---

[4] The jurisdictional statutes in *Ankenbrandt* and *Marshall* differ from those at issue here in an important respect. The original diversity statute applied to "all suits of a civil nature at common law or in equity," 1 Stat. 73, 78 (1789), whereas the original bankruptcy language applied to "all matters and proceedings in bankruptcy." 36 Stat. 1087, 1093 (1911). A proceeding in an Ecclesiastical Court involved civil or canonical matters and the common law, 1 BLACKSTONE *67, *79, but was not a suit *at law*.

a suit at law or equity, did not present the question of jurisdiction over suits *not* in equity and *not* at law.

Similarly, *Marshall* was resolved on a perceived judicial limitation under statutory interpretation not based on the distinction between law-equity courts versus ecclesiastical courts appearing on the face of a statute, 547 U.S. at 308-09; *see also* note 4, *supra; Markham v. Allen,* 326 U.S. 490, 494 (1946) (outlining federal-court jurisdiction with respect to probate matters). The probate exception at issue in Marshall is solely a judicial construct, unlike the law-equity court versus Ecclesiastical Court distinction that appears on the face of Article III and the statutory grants of subject-matter jurisdiction relevant here.

In any event, if Article III's reference to cases at law and equity meant *all* cases, the Framers would have written Article III to say all cases. Put differently, the canon "*expressio unius est exclusio alterius* ... has force ... when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 168 (2003). Here, Article III lists all forms of English jurisdiction except Ecclesiastical Courts, which suggests that the Framers intended to reserve that non-federal form of jurisdiction solely to the states.

Although *amicus* Eagle Forum notes the question whether the Constitution extends to pure marriage-rights cases that are not suits at law or equity, the Court need not answer that question in deciding

these cases because the statutory issue likely resolves the jurisdictional question presented.

2. These Cases Fall Outside the Lower Federal Courts' Statutory Subject-Matter Jurisdiction

At least initially, all relevant acts of Congress to provide jurisdiction to the lower federal courts were limited to actions at law or in equity. Although these statutes were modernized in 1948 to refer to "all civil actions arising under [federal law]," 28 U.S.C. §1331, and "any civil action authorized by law," 28 U.S.C. §1343(a)(3), this Court already has recognized that Congress did not intend the 1948 modernization of that text to confer additional powers not already conferred. Accordingly, this Court must recognize that the lower federal courts' powers face the same limits now that existed when Congress created those powers.

By way of background, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity. *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343. *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* In both statutes, however, Congress adopted the phrasing of Article III by extending jurisdiction only to suits "at law or in equity." *See* 36 Stat. at 1092 ("all suits at law or in equity authorized by law ... to redress [civil rights] deprivation[s]"); *id.* at 1094 ("[a]ny suit of a civil

nature, at law or in equity, arising under" federal law). The modernization of that phrase in 1948, 28 U.S.C. §§1331, 1343, did not expand the scope of the jurisdiction conferred on the lower federal courts: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (repeals by implication disfavored); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision").

Even if this Court ultimately finds that Article III includes pure marriage-rights cases, what Congress meant by "cases in law and equity" excluded marriage-related cases:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.

Ankenbrandt, 504 U.S. at 700. *Ankenbrandt* suggests a narrowing of the domestic-relations exception to cases "involving the issuance of a divorce, alimony, or child custody decree," but not to torts such as fraud. *Id.* at 704. As far as it goes, that distinction supports including the right to marriage in the domestic-relations exception (an issue that *Ankenbrandt* had no reason to decide), *cf. Lopez*, 514 U.S. at 564 (grouping "marriage, divorce, and child custody" as

conceptually related), in contrast to recognized federal jurisdiction over torts at law and in equity.[5]

Under the foregoing analysis, it appears that limitations on the lower federal courts' jurisdiction require same-sex plaintiffs to begin their challenges to state marriage laws in state courts, which have general jurisdiction over these issues. Importantly, denying a federal forum for this suit would not deny all relief, insofar as plaintiffs could bring these federal claims in state court under the doctrine of concurrent jurisdiction. *Haywood*, 556 U.S. at 735. In addition, requiring plaintiffs to file marriage-rights claims in state court would have several policy advantages over federal-court claims. *See* Section I.B, *infra*.

There is a widely-held assumption that federal-question jurisdiction is available for any federal claim. As Justice Holmes recognized in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), sometimes "a page of history is worth a volume of logic." Until 1875, the lower federal courts did not have federal-question jurisdiction.[6] *Merrell Dow*

---

[5] By its terms, *Ankenbrandt* does not warrant side-stepping the domestic-relations exception because the relief requested here either would implicitly include numerous custody decisions or would rapidly descend into custody decisions – which even *Ankenbrandt* considers within the exception – based on state laws presuming paternity for married spouses and other aspects of family law designed with opposite-sex couples in mind. *See* Section I.B.2, *infra*.

[6] Indeed, until 1980, federal-question jurisdiction itself had an amount-in-controversy requirement that likely would have precluded suits over marriage rights under §1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (*citing* Pub. L. No. 94-574,

Pharm., 478 U.S. at 807. As that historical example shows, unexamined assumptions cannot and do not accurately define the bounds of the lower federal courts' jurisdiction. Instead, "because the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channeled to the federal courts." *South Carolina v. Regan*, 465 U.S. 367, 396 (1984). Whatever Congress did not expressly empower the lower federal courts to hear falls outside their jurisdiction:

> [T]he uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.

Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 620 (1875). As creatures of statute, the lower courts have only the jurisdiction that Congress gave them, which need not extend to the full limits – whatever they may be – of the judicial power under Article III.

Finally, one cannot assume that the failure of Congress to expand federal-question and civil-rights jurisdiction under §1331 and §1343 has been a mere oversight that courts might ignore in the interest of perceived justice to the same-sex couples' federal claims. The Constitution establishes a federal

---

90 Stat. 2721 (1976)) (eliminating amount-in-controversy minima for suits against federal agencies and officers); Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980) (same for other suits).

structure of dual state-federal sovereignty, *Tafflin*, 493 U.S. at 458-59; U.S. CONST. amend. X. While the Sixth Circuit appropriately allowed the States to appear before the same panel on the same day to defend their marriage laws, other circuits have not provided their states the same luxury. Due primarily to the variable timings of litigation in various states, South Carolina now must defend her laws before a Fourth Circuit that already has resolved the constitutional issue against court clerks from Virginia. If, instead, this type of litigation had to begin in state court, each state would proceed in its own courts before the final review, if any, in this Court. Indeed, that course would be consistent with *Baker v. Nelson*, 409 U.S. 810 (1972), this Court's prior review of same-sex marriage, which found marriage-rights claims not to present a substantial federal question. *Amicus* Eagle Forum respectfully submits that that procedure would prove markedly more consistent with the Eleventh Amendment and our federal structure than allowing these suits to begin in the lower federal courts.

3. The Lower Federal Courts' Authority over Marriage Rights May Be Narrower than this Court's Authority under Article III

Even if this Court ultimately interprets Article III to include federal authority over marriage rights, that would not answer the statutory question. Indeed, the question of whether this Court would have jurisdiction under Article III to hear an appeal from a state court must await a petition for a writ of *certiorari* from a state court judgment.

The domestic-relations exception's application here may not foreclose this Court's hearing an appeal from a state court on the scope of the Fourteenth Amendment. Article III's scope is broader than §1331's scope. *Compare, e.g., Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) *with Am. Well Works v. Layne,* 241 US 257, 259-60 (1916); *cf. Merrell Dow Pharm.*, 478 U.S. at 807. Moreover, other marriage-related cases would fall within the law-equity categories, even if a pure marriage-rights case does not.

For example, *Loving v. Virginia,* 388 U.S. 1 (1967), arose from a criminal action appealed from a state supreme court, *Loving v. Commonwealth,* 206 Va. 924, 925, 147 S.E.2d 78 (Va. 1966), and *U.S. v. Windsor,* 133 S.Ct. 2675 (2013), reached this Court from a federal district-court tax-refund action brought under 28 U.S.C. §1346(a)(1). In both cases, the suit was in equity (*Loving*) or law (*Windsor*), and the petitioner Loving and plaintiff Windsor did not seek the right to marry, having married under another jurisdiction's laws that implicated rights *vis-à-vis* the respondent Virginia and defendant United States. Accordingly, it is likely that a case eventually – or even soon – will reach this Court on the merits question that the plaintiffs here ask this Court to decide.

Another group of this Court's decisions touch upon domestic-relations issues on direct review from state court systems under 28 U.S.C. §1257, with no discussion – for or against – of a domestic-relations exception to Article III jurisdiction under the Constitution. For example, *Palmore v. Sidoti,* 466

U.S. 429, 430 (1984), reviewed the "judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race." *See also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (California Court of Appeal); *Troxel v. Granville*, 530 U.S. 57 (2000) (Supreme Court of Washington); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) (Supreme Court of South Carolina). In all of these decisions, this Court simply did not discuss a domestic-relations limit on Article III jurisdiction, which proves nothing.

> The short of the matter is that the jurisdictional character of the elements of the cause of action in [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987)] made no substantive difference ..., had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort ... have no precedential effect.

Steel Co., 523 U.S. at 91. As such, these merits decisions do not rebut a domestic-relations exception to Article III jurisdiction.[7]

---

[7] In *Zablocki v. Redhail*, 429 U.S. 1089 (1977), this Court noted probable jurisdiction over *Redhail v. Zablocki*, 418 F. Supp. 1061, 1062-63 (E.D. Wis. 1976) (district-court challenge to marriage-related state law), but the parties subsequently did not press and the Court did not discuss jurisdiction in this Court. *Zablocki v. Redhail*, 434 U.S. 374 (1978). Because probable jurisdiction is not the same as jurisdiction, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), the *Redhail* litigation is another "drive-by jurisdictional ruling" under *Steel Company*.

B. Marriage-Rights Litigation Belongs in State Court

The previous section explained why the history of not only Article III but also the statutory grants of federal-court subject-matter jurisdiction compel the conclusion that pure marriage-rights cases must be filed in state courts. In this section, *amicus* Eagle Forum identifies several reasons why state-court review is more appropriate for the momentous issues of domestic relations raised here.

1. The Constitution Must Be Construed to Have the States – Not this Court or Congress – Set the Policies for Domestic Relations

In *dicta* roughly contemporaneous with the Fourteenth Amendment's ratification, this Court noted that a "State ... has *absolute right* to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 734-35 (1878) (emphasis added). This Court's status as an impartial arbiter – as opposed to another political branch – depends on the Court's confining itself to the plain intent of the constitutional texts that it interprets, without imposing the policy preferences of a majority of the Court's justices on the People or the States. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The question of what constitutes "marriage" is a foundational issue that the People and the States reserved to themselves. *Cf. Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014). *Amicus* Eagle Forum respectfully submits

that this Court should leave this issue to state courts to resolve in conjunction with their state's legislature.

2. A Marriage-Rights Rulings' Profound Effects on Children Counsel for State-Court Review

Because *Windsor*, 133 S.Ct. at 2964, expresses concern for children in same-sex marriages and their wellbeing, *amicus* Eagle Forum emphasizes that the state courts are best suited (by far) to consider the interests of children within their jurisdictions. States have developed family law to seek the best interests of both society and family members. The requested relief here – either marriage rights or marriage recognition – is only the beginning of the inquiry.

To take one example, state family law commonly presumes that a husband is the father of children born during his marriage. *See, e.g.*, TENN. CODE ANN. §36-2-304(a). Although such presumptions often are plausible even when not true, society has fashioned them to maximize children's chances of being raised in a nuclear family.

For obvious biological reasons, transferring that presumption into same-sex marriages would wrest it from its moorings. In one famous example, the California appellate courts could not resolve the dueling presumptions between a presumed (and biological) father versus a female presumed-parent (and divorcing spouse who lived with the child for only three weeks), after the biological mother was imprisoned for attempting to murder the allegedly abusive same-sex spouse. *In re M.C.*, 195 Cal.App.4th 197, 222-23 (Cal. Ct. App. 2011); *see*

generally Nancy D. Polikoff, *And Baby Makes ... How Many? Using* In re M.C. *To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple,* 100 GEO. L.J. 2015 (2012). If nothing else, *M.C.* demonstrates the impossibility of a Fourteenth-Amendment blanket assessment of the best interests of thousands of non-party children who have a biological parent in a same-sex relationship. Pushing M.C. closer to his biological mother's same-sex spouse pulled him away from his biological father to an equal, but opposite, degree. Since this nation's founding, state courts and authorities have determined these children's best interests on an individualized basis, but the theory of these cases proposes to federalize these issues under the Fourteenth Amendment.

In response to *M.C.*, California amended its presumed-parent statute in 2013: "Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way," 2013 CAL. STAT. 564, §(1)(a), thereby expressly abrogating the *M.C.* decision. *Id.* §1(b). The same-sex marriage cases – and, if they succeed, their aftermath – threaten to federalize vast areas of law heretofore almost exclusively the purview of the states. States that voluntarily adopt same-sex marriage agree to struggle through these revisions to the very fabric of society, with the attendant implications for all involved (*e.g.*, the children, siblings, fathers outside female same-sex marriages, and grandparents). This Court should neither federalize these issues nor thrust them on states that do not adopt them voluntarily.

As the *M.C.* case demonstrates, the children who live with same-sex couples often have another parent who lives outside that couple. (Even with artificial insemination, those children only have one biological parent within the same-sex couple.) Having a federal court press on with a ruling, without either authority or expertise in family law, would not serve the best interests of the children involved.

For example, adoption law has many purposes, including the determination that an unrelated person is fit to have care and custody of a child. "[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Both an adoptive parent and a non-biological parent in a same-sex marriage lack "natural bonds of affection" for the child. With an opposite-sex widow (or widower) who seeks to enter a new opposite-sex marriage, the new husband (or wife) would have to go through the States' adoption procedures to adopt his wife's (or her husband's) child. Although same-sex plaintiffs demand more expeditious rights and recognition, *amicus* Eagle Forum respectfully submits that the Fourteenth Amendment provides no reason why a same-sex partner who lacks the "natural bonds of affection" with the child to the same degree should be excused from the same adoption procedures. Considerations such as these provide further impetus for filing these cases in state court.

Indeed, on their own, Michigan, Kentucky, and Tennessee continue to address presumptions about paternity, in the best interests of the children and

families. Significantly, these States have not taken the same path in resolving these issues, which emphasizes that the one-size-fits all approach of a federal lawsuit is inappropriate in the family-law context. *Compare, e.g., Hinshaw v. Hinshaw*, 237 S.W.3d 170 (Ky. 2007) (awarding primary custody to husband who was presumed father but not biological father) *with In re T.K.Y.*, 205 S.W.3d 343 (Tenn. 2006) (recognizing legal co-father status of biological father who bore a child with a married woman who stayed married to her presumed-father husband). For its part, Michigan recently enacted a Revocation of Parentage Act, 2012 Mich. Pub. Act 159 (MICH. COMP. LAWS §§722.1101-722.1013), to allow biological fathers to prove paternity of a child born or conceived during a third-party marriage. As these recent developments show, the States continue to work to ensure the best interests of children and society. *Amicus* Eagle Forum respectfully submits that the lower federal courts are ill-suited to the task of helping with that process.

3. The States' Leeway to Craft an Appropriate Remedy Counsels for State-Court Review

Even assuming *arguendo* that the final judgment in this Court finds an equal-protection or due-process violation, the States need not grant the marriage rights that the plaintiffs seek. Quite simply, if the States cannot regulate marriage on their own terms, neither this Court nor even the United States can compel the States to regulate marriage *at all:*

> when the right invoked is that to equal treatment, the appropriate remedy is a

> *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). The States could, therefore, redress any perceived constitutional violations by exiting the marriage field altogether. *Amicus* Eagle Forum does not argue that the States should exit the field if this Court invalidates traditional husband-wife marriage. Rather, *amicus* Eagle Forum merely argues that the decision is the States' alone.

If perceived constitutional violations arise from the States' treating other out-of-state marriages differently, the fact that each of the States' laws on same-sex marriage are constitutional also would have a bearing on the appropriate State remedies to any such violations. If the treatment of opposite-sex marriages differs from that of same-sex marriages, but the laws that justify the opposite-sex treatment are merely statutory or common-law dictates, the constitutional requirements for the treatment of same-sex marriages may trump the opposite-sex provisions as a matter of state law. *Amicus* Eagle Forum respectfully submits that only the State courts can resolve the appropriate remedy, in the event that this Court rules against the States on the merits.

II. FEDERAL COURTS LACK JURISDICTION FOR MARRIAGE-RECOGNITION CLAIMS

In addition to dismissing these cases for falling within the domestic-relations exception to federal

jurisdiction, this Court should dismiss the marriage-recognition claims as outside federal jurisdiction under this Court's precedents under the Full Faith and Credit Clause. At bottom, the Tennessee, Ohio, and Kentucky marriage-recognition claims seek full faith and credit for the plaintiffs' out-of-state, same-sex marriages, but such claims are not cognizable in a federal court until the out-of-state arrangement is reduced to a state-court judgment.

A. The Full Faith and Credit Clause – Not the Fourteenth Amendment – Controls Marriage-Recognition Claims

Although the marriage-recognition claims in the Kentucky, Ohio, and Tennessee cases seek to invoke the Fourteenth Amendment, the claims properly fall under the Full Faith and Credit Clause:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Albright v. Oliver, 510 U.S. 266, 273 (1994) (*quoting Graham v. Connor*, 490 U.S. 386, 395 (1989)). To be clear, the States need not dispute whether the plaintiffs have valid out-of-state marriages under the laws of the out-of-state forums. Instead, the States need only dispute whether those out-of-state acts have any force within their State: "To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *M'Elmoyle v. Cohen*,

38 U.S. (13 Pet.) 312, 325 (1839). Under full-faith-and-credit principles, the plaintiffs cannot establish their marriage-recognition claims against the States' marriage laws.[8]

B. Plaintiffs Have Not Challenged 28 U.S.C. §1738C, which *Windsor* Did Not Impair

In the exercise of its plenary authority under the Full Faith and Credit Clause, Congress authorized the States not to recognize out-of-state, same-sex marriages, 28 U.S.C. §1738C, and the plaintiffs have not challenged §1738C. Moreover, *Windsor* did not invalidate – or even discuss – §1738C, which leaves §1738C as a barrier to marriage-recognition claims.

The Full Faith and Credit Clause gives Congress plenary authority "by general Laws [to] prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof.*" U.S. CONST. art. IV, §1 (emphasis added). When Congress exercises plenary authority under constitutional provisions within its jurisdiction, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to ... challenge" under that constitutional provision. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981). Thus, "Congress has plenary

---

[8] To the extent that the plaintiffs seek to bind the States to the fact of the plaintiffs' valid out-of-state marriages, the States were not party to the marriage proceedings, making full-faith-and-credit protection inapplicable on due-process grounds. *See Haddock v. Haddock*, 201 U.S. 562, 567 (1906), *overruled on other grounds, Williams v. North Carolina*, 317 U.S. 287, 304 (1942); *Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946); *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998).

authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). Because they have not challenged §1738C, the plaintiffs should lose their marriage-recognition claims, even if this Court had jurisdiction to hear those claims.

In *Windsor*, the plaintiff had complied with the tax-refund procedures of 28 U.S.C. §1346(a), and the Court held that she was entitled to tax relief because 1 U.S.C. §7 was unconstitutional as applied to her and her tax refund. Significantly, that process entitled her to a money judgment against the federal government, but it did not entitle her to declaratory relief. *Lee v. Thornton*, 420 U.S. 139, 139-40 (1975); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). As a tax matter, *Windsor* is unremarkable because the "character and extent of property interests under local law often determine the reach of federal tax statutes." *Fernandez v. Wiener*, 326 U.S. 340, 365 (1945) (Douglas, J., concurring) (collecting cases). Certainly, nothing in *Windsor* undermines §1738C as a valid act of the plenary power of Congress to legislate on the effect of out-of-state marriages under the Full Faith and Credit Clause.

C. Federal Courts Lack Jurisdiction for Full-Faith-and-Credit Claims Based on Out-of-State Marriages

Under the Full Faith and Credit Clause, a plaintiff's demand that states recognize out-of-state marriages does not fall within federal-question

jurisdiction or even invoke a right enforceable in the lower federal courts. Instead, the only federal-court review would come if this Court reviews the case out of the relevant state-court system. *See Thompson v. Thompson*, 484 U.S. 174, 183-84, 185-87 (1988). "[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action." *Thompson*, 484 U.S. at 182. In essence, no federal question arises until a state court fails to give full faith and credit to the law of a sister state. *Chicago & A.R. Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 23-24 (1883). Unfortunately for plaintiffs here, "to invoke the rule which [the Full Faith and Credit Clause] prescribes does not make a case arising under the Constitution or laws of the United States." *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904). For that reason, the district courts lacked jurisdiction to hear marriage-recognition claims.

In cases like this one, "jurisdictional dismissal for failing to assert a colorable constitutional claim is appropriate for cases brought under the full faith and credit clause 'because the Clause does not create substantive rights but rather provides a rule of decision (*i.e.*, a procedural rule) for state and federal courts.'" *Adar v. Smith*, 639 F.3d 146, 157 n.7 (5th Cir. 2011) (*en banc*) (*quoting* Lumen N. Mulligan, "A Unified Theory of 28 U.S.C. § 1331 Jurisdiction," 61 VAND. L. REV. 1667, 1706-07 (2008)). Simply put, the Kentucky, Ohio, and Tennessee plaintiffs' marriage-recognition claims are controversies that the lower federal courts lack jurisdiction to consider.

CONCLUSION

This Court should hold that the lower federal courts lack subject-matter jurisdiction to review marriage-rights and marriage-recognition cases and remand with instructions to dismiss these actions for lack of subject-matter jurisdiction.

March 6, 2015

Respectfully submitted,
Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for *Amicus Curiae*